

➤ PART II ➤

CORE ISSUES FOR ALL SCHOOLS TO CONSIDER

1. Does the First Amendment apply to public schools?

Yes. The First Amendment applies to all levels of government, including public schools. Although the courts have permitted school officials to limit the rights of students under some circumstances, the courts have also recognized that students—like all citizens—are guaranteed the rights protected by the First Amendment.

Earlier in our history, however, the First Amendment did not apply to the states—and thus not to public schools. When adopted in 1791, the First Amendment applied only to Congress and the federal government (“Congress shall make no law . . .”). This meant that when public schools were founded in the mid-19th century, students could not make First Amendment claims against the actions of school officials.

The restrictions on student speech lasted into the 20th century. In 1908, for example, the Wisconsin Supreme Court ruled that school officials could suspend two students for writing a poem ridiculing their teachers that was published in a local newspaper.¹ The Wisconsin court reasoned, “such power is essential to the preservation of order, decency, decorum, and good government in the public schools.” And in 1915, the California Court of Appeals ruled that school officials could suspend a student for criticizing and “slamming” school officials in a student assembly speech.²

In fact, despite the passage of the 14th Amendment in 1868, which provides that “no state shall . . . deprive any person of life, liberty or property without due process of law . . .”, it was not until 1925, by way of the Supreme Court case of *Gitlow v. New York*, that the Supreme Court held that

the freedom of speech guaranteed by the First Amendment is one of the “liberties” incorporated by the Due Process Clause of the 14th Amendment.

In subsequent cases, the Court has applied all of the freedoms of the First Amendment to the states—and thus to public schools—through the 14th Amendment. But not until 1943, in the flag-salute case of *West Virginia v. Barnette*,³ did the U.S. Supreme Court explicitly extend First Amendment protection to students attending public schools.

The *Barnette* case began when several students who were Jehovah’s Witnesses refused to salute the flag for religious reasons. School officials punished the students and their parents. The students then sued, claiming a violation of their First Amendment rights.

At the time that the students sued, Supreme Court precedent painted a bleak picture for their chances. Just a few years earlier, the Court had ruled in favor of a similar compulsory flag-salute law in *Minersville School District v. Gobitis*.⁴ As the Court stated in that ruling, “national unity is the basis of national security.”

However, the high court reversed itself in *Barnette*, holding that the free speech and free exercise of religion provisions of the First Amendment guarantee the right of students to be excused from the flag salute on grounds of conscience.

Writing for the majority, Justice Robert Jackson said that the Supreme Court must ensure “scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”⁵ The Court then warned of the dangers of coercion by government in oft-cited, eloquent language:

If there is any fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.⁶

Religious Liberty: The Establishment Clause

2. The First Amendment says that the government may not “establish” religion. What does that mean in a public school?

The meaning of the Establishment Clause, often referred to as the “separation of church and state,” has been much debated throughout our

history. Does it require, as described in Thomas Jefferson's famous 1801 letter to the Danbury Baptists, a high "wall of separation"? Or may government support religion as long as no one religion is favored over others? How can school officials determine when they are violating the Establishment Clause?

In the last several decades, the Supreme Court has crafted several tests to determine when state action becomes "establishment" of religion. No one test is currently favored by a majority of the Court. Nevertheless, no matter what test is used, it is fair to say that the Court has been stricter about applying the Establishment Clause in public schools than in other government settings. For example, the Court has upheld legislative prayer, but struck down teacher-led prayer in public schools.⁷ The Court applies the Establishment Clause more rigorously in public schools, mostly for two reasons: (1) students are impressionable young people, and (2) they are a "captive audience" required by the state to attend school.

When applying the Establishment Clause to public schools, the Court often emphasizes the importance of "neutrality" by school officials toward religion. This means that public schools may neither inculcate nor inhibit religion. They also may not prefer one religion over another—or religion over nonreligion.

3. If school officials are supposed to be "neutral" toward religion under the Establishment Clause, does that mean they should keep religion out of public schools?

No. By "neutrality" the Supreme Court does not mean hostility to religion. Nor does it mean ignoring religion. Neutrality means protecting the religious liberty rights of all students while simultaneously rejecting school endorsement or promotion of religion.

In 1995, 24 major religious and educational organizations defined religious liberty in public schools this way:

Public schools may not inculcate nor inhibit religion. They must be places where religion and religious conviction are treated with fairness and respect.

Public schools uphold the First Amendment when they protect the religious liberty rights of students of all faiths or none. Schools demonstrate fairness when they ensure that the curriculum includes study *about* religion as an important part of a complete education.⁸

4. Does the Establishment Clause apply to students in a public school?

The Establishment Clause speaks to what *government* may or may not do. It does not apply to the private speech of students. School officials should keep in mind the distinction between government (in this case "school") speech endorsing religion—which the Establishment Clause prohibits—and private (in this case "student") speech endorsing religion, which the free speech and free exercise clauses protect.⁹

Student religious expression may, however, raise Establishment Clause concerns when such expression takes place before a captive audience in a classroom or at a school-sponsored event. Students have the right to pray alone or in groups or to discuss their faith with classmates, as long as they aren't disruptive or coercive. And they may express their religious views in class assignments or discussions, as long as it is relevant to the subject under consideration and meets the requirements of the assignment.¹⁰ But students don't have a right to force a captive audience to participate in religious exercises.

It isn't entirely clear under current law where teachers and administrators may draw a line limiting student religious expression before a captive audience in a classroom or school-sponsored event. In several recent cases, lower courts have deferred to the judgment of educators about when to limit the religious expression of students in a classroom or school setting. A general guide might be to allow students to express their religious views in a classroom or at a school event as long as they don't ask the audience to participate in a religious activity, use the opportunity to deliver a proselytizing sermon, or give the impression that their views are supported by or endorsed by the school.¹¹

5. How can school officials tell when a planned school action or activity might violate the Establishment Clause?

Here are some questions that teachers and administrators should ask themselves when planning activities that may involve religious content (e.g., a holiday assembly in December):

- Do I have a distinct *educational* or civic purpose in mind? If so, what is it? (It may not be the purpose of the public school to promote or denigrate religion.)

- Have I done what I can to ensure that this activity is not designed in any way to either promote or inhibit religion?
- Does this activity serve the educational mission of the school or the academic goals of the course?
- Have I done what I can to ensure that no student or parent may be made to feel like an outsider, and not a full member of the community, by this activity?
- If I am teaching about religion, am I balanced, accurate, and academic in my approach?

Religious Liberty: The Free Exercise Clause

6. What does “free exercise” of religion mean under the First Amendment?

The Free Exercise Clause of the First Amendment states that the government “shall make no law . . . prohibiting the free exercise of religion.” Although the text sounds absolute, “no law” does not always mean “no law.” The Supreme Court has had to place some limits on the freedom to practice religion. To take an easy example cited by the Court in one of its landmark “free exercise” cases, the First Amendment would not protect the practice of human sacrifice even if some religion required it.¹² In other words, while the freedom to believe is absolute, the freedom to act on those beliefs is not.

But where may government draw the line on the practice of religion? The courts have struggled with the answer to that question for much of our history. Over time, the Supreme Court developed a test to help judges determine the limits of free exercise. First fully articulated in the 1963 case of *Sherbert v. Verner*, this test is sometimes referred to as the *Sherbert* or “compelling interest” test. The test has four parts: two that apply to any person who claims that his freedom of religion has been violated, and two that apply to the government agency accused of violating those rights.

For the individual, the court must determine

- whether the person has a claim involving a sincere religious belief, and
- whether the government action is a substantial burden on the person’s ability to act on that belief.

If these two elements are established, then the government must prove

- that it is acting in furtherance of a “compelling state interest,” and
- that it has pursued that interest in the manner least restrictive, or least burdensome, to religion.¹³

The Supreme Court, however, curtailed the application of the *Sherbert* test in the 1990 case of *Employment Division v. Smith*. In that case, the Court held that a burden on free exercise no longer had to be justified by a compelling state interest if the burden was an unintended result of laws that are generally applicable.¹⁴

After *Smith*, only laws (or government actions) that (1) were intended to prohibit the free exercise of religion, or (2) violated other constitutional rights, such as freedom of speech, were subject to the compelling interest test. For example, a state could not pass a law stating that Native Americans are prohibited from using peyote, but it could accomplish the same result by prohibiting the use of peyote by everyone.

In the wake of *Smith*, many religious and civil liberties groups have worked to restore the *Sherbert* test—or compelling interest test—through legislation. These efforts have been successful in some states. In other states, the courts have ruled that the compelling interest test is applicable to religious claims by virtue of the state’s own constitution. In many states, however, the level of protection for free exercise claims is uncertain.

Accommodating the Religious Needs and Requirements of Students

7. How should school officials determine when they must accommodate a religious liberty claim under the Free Exercise Clause?

As noted previously, the application of the *Sherbert* or compelling interest test was sharply curtailed by the 1990 Supreme Court decision, *Employment Division v. Smith*. But some states—such as Florida, Texas, and Connecticut—have passed laws requiring the use of a “compelling interest test” in free exercise cases. Moreover, since most cases involving public schools involve more than one constitutional right (e.g., the religion claim can be linked with a parental right or free speech claim), some

might argue that the compelling interest test must be used even under *Smith*.

Regardless of how this is eventually settled in the courts, public schools fulfill the *spirit* of the First Amendment when they use the *Sherbert* test to accommodate the religious claims of students and parents where feasible.

3. May students be excused from parts of the curriculum for religious reasons?

As good educational policy, school officials, whenever possible, should try to accommodate the requests of parents and students for excusal for religious reasons from specific classroom discussions or activities.

In "A Parent's Guide to Religion in the Public Schools," the National PTA and the First Amendment Center give the following advice concerning excusal requests:

If focused on a specific discussion, assignment, or activity, such requests should be routinely granted to strike a balance between the student's religious freedom and the school's interest in providing a well-rounded education. If it is proved that particular lessons substantially burden a student's free exercise of religion and if the school cannot prove a compelling interest in requiring attendance, some courts may require the school to excuse the student.¹⁵

It is important for teachers and administrators to ask themselves the questions posed in the *Sherbert* test as they make decisions about how to accommodate excusal requests.

Let's look at one example of how the *Sherbert* test might be used in a public school: If parents ask for their child to be excused from reading a particular book for religious reasons, the teacher and administrator should first ask if the request is based on a sincere religious belief. Note that the religious belief need not be rational or even sensible to the school official. It need only be sincere. When parents and students take the time to object to a particular reading or activity, they are usually sincere.

Next, school officials must determine whether or not reading the assigned book would constitute a "substantial burden" on the student's religious liberty rights. This is more difficult to determine, but in most cases, if the parent and student find the book deeply offensive to their religious beliefs, then making the student read the book would likely be a substantial burden on her religious freedom.

The inquiry then shifts to the school, which needs to demonstrate it has a "compelling state interest"—described by the Supreme Court as "an interest of the highest order."¹⁶ Clearly, public schools have a compelling interest in the education and welfare of children. In this instance, for example, the school clearly has a compelling interest in teaching the student to read. But the last part of the test requires that the school pursue that interest in a manner *least restrictive* of a complaining family's religion. Thus the school may have an interest in teaching the student to read, but can that interest be accomplished without making the student read that particular book? In other words, the school should choose a course of action that does not violate the student's religion if such a course of action is available and feasible for the school.

This may be easy to do if a student and parent object to a particular reading assignment on religious grounds. When this happens, the teacher may simply assign an alternate selection. If, however, requests for exemption become too frequent or too burdensome for the school, a court will probably find the school's refusal to offer additional alternatives to be justified.

9. How should school officials respond to requests for accommodation of religious practices during the school day?

Enforcing adherence to religious requirements, such as special diet or dress, is the responsibility of parents and students, not of the public school.

However, some religious requirements or practices may conflict with school practices or schedules. In those cases, school officials should try to accommodate these needs if feasible. Let's look at a few examples.

Jehovah's Witnesses may ask that their children be excused from birthday or holiday activities. Teachers should honor these requests by planning alternate activities or time in the library for affected students.

The school may have a "no caps" policy because of concerns about gang activity. But exemptions should be made for Orthodox Jews and other students who must wear head coverings for religious reasons.

Muslim students may request permission to pray in a designated area during the school day. If space is available, and if the educational process isn't disrupted, schools should try to grant this request. Schools may not set up "prayer rooms," but they may find ways to allow students to meet their religious obligations.

Students of various faiths may have dietary restrictions. Under the Establishment Clause, schools may not prepare special foods to fulfill a student's particular religious requirements. But schools may help their religious students and others by labeling foods and offering a variety of choices at every meal.

As noted in the answer to Question 6, it is not entirely clear under current law how much accommodation schools must make for "free exercise" claims. And the legal requirement to accommodate requests may vary from state to state, depending on state law and state constitutional provisions. Nevertheless, schools uphold the principles of religious liberty and the spirit of the First Amendment when they make every effort to accommodate religious requests for exemption from school policies or practices.

10. May students be absent for religious holidays?

Schools should have policies concerning absences that take into account the religious needs and requirements of students. Students should be allowed a reasonable number of excused absences, without penalties, to observe religious holidays within their traditions. Students may be asked to complete makeup assignments or tests in conjunction with such absences.

School Prayer and Student Religious Expression

11. Is it legal for students to pray in public schools?

Yes. Contrary to popular myth, the Supreme Court has never outlawed "prayer in schools." Students are free to pray alone or in groups, as long as such prayers are not disruptive and do not infringe upon the rights of others. But this right "to engage in voluntary prayer does not include the right to have a captive audience listen or to compel other students to participate."¹⁷

What the Supreme Court has repeatedly struck down are state-sponsored or state-organized prayers in public schools.

The Supreme Court has made clear that prayers organized or sponsored by a public school—even when delivered by a student—violate the First Amendment, whether in a classroom, over the public address system, at a graduation exercise, or even at a high school football game.¹⁸

12. May students share their religious faith in public schools?

Yes. Students are free to share their faith with their peers, as long as the activity is not disruptive and does not infringe upon the rights of others.

School officials possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities. But they may not structure or administer such rules to discriminate against religious activity or speech.

This means that students have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activities.¹⁹ For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests.

Generally, students may share their faith or pray in a nondisruptive manner when not engaged in school activities or instruction, subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as applied to other student activities and speech.²⁰

Students may also speak to and attempt to persuade their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede if a student's speech begins to constitute harassment of a student or group of students.

Students may also participate in before- or after-school events with religious content, such as "See You at the Pole" gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event.

Keep in mind, however, that the right to engage in voluntary prayer or religious discussion free from discrimination does not necessarily include the right to preach to a "captive audience," like an assembly, or to compel other students to participate. To that end, teachers and school administrators should work to ensure that no student is in any way coerced—either psychologically or physically—to participate in a religious activity.²¹

13. May students express their beliefs about religion in classroom assignments or at school-sponsored events?

Yes, within limits. Generally, if it is relevant to the subject under consideration and meets the requirements of the assignment, students should